United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

75-7038

7037

75-7055 75-7057

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B 8/5

HOWARD BERSCH,

Plaintiff-Appellee,

v.

DREXEL FIRESTONE, INCORPORATED, DREXEL HARRIMAN RIPLEY, BANQUE ROTHCHILD, HILL SAMUEL & COMPANY, LIMITED, GUINNESS MAHON & CO., LIMITED, PIERSON, HELDRING & PIERSON, SMITH BARNEY & CO., INCORPORATED, J.H. CRANG & CO., AND INVESTORS OVERSEAS BANK, LIMITED,

Deferdants,

ARTHUR ANDERSEN & CO., I.O.S., LTD., and BERNARD CORNFELD,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

PETITION FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC

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10

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treatises, Books and Articles

Miscellaneous

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75-7055
75-7057

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PETITION FOR REHARING AND SUGGESTION THAT IT BE HEARD IN BANC

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, plaintiff-appellee respectfully prays for a rehearing on the appeal in this case, and suggests that such rehearing be in banc.

STATEMENT OF THE CASE

This is a class action commenced by plaintiff on behalf of himself and all persons who purchased the common stock of I.O.S., Ltd. (IOS) at a public offering held in September, 1969, allegedly made pursuant to a false and misleading prospectus. Plaintiff, a United States citizen and resident of New York, purchased 600 shares of IOS common stock at the public offering in New York. Although it appears at least 385 other United States citizens resident here and abroad purchased stock at the IOS public offering, the class is mainly composed of foreign nationals.

On December 4, 1974, Judge Carter signed an order providing for a hearing on a settlement reached with certain of the defendants and the sending of notice to the class. On December 19, 1974, this Court, advised by defendant Arthur Andersen & Co. (Andersen) that it had moved for leave to appeal an adverse decision rendered by Judge Carter on subject matter jurisdiction, stayed the December 4 Order, pending a determination of the motion for leave to appeal.

On April 28, 1975, in an opinion by Senior Judge Henry J. Friendly, the Court held that the District Court had jurisdiction over the claims of the American class members residing here and abroad who purchased IOS stock at the public offering, but that jurisdiction did not extend to the identical claims of foreign nationals. The stay previously granted was made permanent.

Plaintiff contends that Judge Friendly's decision insofar as it denied protection to foreign nationals defrauded by Americans, was contrary to controlling precedents, established principles of statutory interpretation and the legislative history and purpose of the antifraud provisions of the national securities laws.

POINT ONE

THE DECISION OF THE PANEL WAS CLEARLY ERRONEOUS. REHEARING SHOULD BE GRANTED

The instant appeal presented for review important issues with respect to the extraterritorial reach of the national securities laws. The case derived from an international securities transaction, massive in size, complex in concept and execution, involving all of the various factors previously deemed critical in the jurisdictional calculus. In a simplistic opinion, based only upon nationality, Judge Friendly determined that while the District Court has jurisdictional competence based upon recognized principles of international law, the power to exercise such jurisdiction is limited by the scope of Congressional intent. That conclusion, however, represents "not what Congress would have wished," but, rather, the personal predilections of Judge Friendly and his bias toward class actions. It is grounded upon the erroneous application of international law, is bolstered by faulty

analysis of relevant judicial precedent, and is characterized by a parochial outlook, unresponsive to the problems created by the phenomenal growth in international securities trade and insensitive to the rights of individuals in a world of ever increasing transnational interaction.

Although Judge Friendly claims to have sought the intended reach of the securities laws, the opinion of the Court is premised not upon sound statutory interpretation, but, rather, on the prejudices of its author with respect to class actions. Judge Friendly freely acknowledges that the conclusions reached are not compelled by any language in the statutes or even in the legislative history, since Congress did not foresee the development of off-shore funds. However, not only are such conclusions unsupported by statutory language, but plaintiff submits, they run counter to the very fabric of the securities laws and subvert the Congressional intent.

A. The Court Miscontrued the Congressional Intent, Substituing its Own View as to What Such Intent Should Have Been

> "In construing a statute whose meaning is not clear, the first inquiry is one as to legislative intent, pursuant to the obligation of giving effect to the plain purpose of the statute ... Legislative intent has no reference to what may have been in the mind of the person who wrote the statute, or whether there was anything in particular in the minds of individual legislators who voted for its enactment. Intent as here used relates to the purpose to be served

> by the statute, and the statute is to be looked upon as if some unified legislative spirit motivated its enactment."*

To discover this mind or spirit in the absence of clear legislative history, resort should be had to an examination of the conditions comprising the background of legislative action and the language of the statute itself. Thus, the statutory language and legislative purpose are the principal determinants in a search for Congressional intent.

The mere fact that Congress did not anticipate the creation of off-shore funds does not vest the Court with unbridled authority to guess what the legislative "would have intended on a point not present to its mind, if the point had been present."** As one commentator has noted, "what a legislator did think of makes a difference. But what he did not think of does not make a difference unless he would have excepted it had he thought of it."*** The difficulty, of course, lies in determining "whether he would have excepted it" and in many instances, the question "may have no decisive answer."**** However, in the instant case, the conduct which Congress intended to except has been explicitly

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* Day v. North American Rayon Corp. 140 F. Supp. 490, 491 (W.D. Tenn. 1956)

** Cardozo, The Nature of the Judicial Process, 15 (1921) quoting Gray, Nature and Sources of the Law, §370, p.165

*** McCallum, Legislative Intent, 75 Yale L.J. 754, 773 (1966) (emphasis in original)

**** Loc. Cit.

articulated in the language of the statute and this provision, coupled with an examination of the circumstances compelling the statutory formulation, reveal that Judge Friendly's free-wheeling interpretation of Congressional "intent" constitutes only an expression of his own views.

1. Congressional Intent Is Revealed By the Language and Purpose of the Securities Laws

a. The Statutory Language.

The language of the Securities Exchange Act of 1934, 15 U.S.C. §78a et seq. (Exchange Act) indicates that Congress intended to extend the protection of the United States law to foreigners injured in violation of such laws. Where a particular statutory view cannot be determined with precision, the court will look to the statute, itself, to find "legislative intent".* "It is no bar to interpreting a statute as applicable that 'the question which is raised on the statute never occurred in the legislature'"**. In such situations "[m]ost certainly then in the absence of any legislative history in point should not outweigh the words of the statute."***

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* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412 n. 29 (1971).

** Eastern Airlines, Inc. v. CAB, 122 U.S. App. D. C. 375 354 F.2d 507, 511 (1965) citing Cardozo, loc. cit.

*** Souder v. Brennan, 367 F. Supp. 808, 812-813 (D.D.C. 1973)

An examination of the language of the federal securities statutes indicates that Congress addressed a perceived need to regulate extraterritorial activity of Americans and foreigners which has a substantial impact upon United States commerce. Contrary to the impression Judge Friendly seeks to create, i.e. that Congress did not consider the application of the securities laws to foreign transactions, these laws, themselves, evidence the fact that Congress gave such matters serious thought and, indeed, intended the securities laws to have extraterritorial effect. Thus, the subtitle of the Exchange Act is "an act to provide for the regulation of securities exchanges and all over-the-counter markets operating and in interstate and foreign commerce and through the mails to prevent inequitable and unfair practices on such exchanges and markets, and for other purposes." (emphasis supplied)

In defining "interstate commerce," Congress included instrumentalities of foreign countries as well as traditional interstate means. In Section 30(b)* Congress made clear what it would have "excepted", exempting foreign broker-dealers who engaged in securities wholly without the jurisdiction of the United States. Thus, there arises the clear inference that Congress intended that Americans and other foreign persons not be exempt from the Exchange Act. Implicit in the decision to give a limited exemption is a recognition by Congress of the objective territorial principle and the fact that foreign

* 15 U.S.C. §78dd(b).

to accept the class action concept has little sympathy for

language of the statute and its meaning as set forth in Schoenbaum,* substituting instead his own judicial creation of artificial categories. While perhaps, as Judge Friendly believes, at times a judge, in interpreting law, need not "go through the forum of re-examining the efficacy of every element in the pharmacopoeia,"** he should, nevertheless, not demand that esoteric drugs be used where mere aspirin will suffice.

b. The Congressional Purpose Will Be Frustrated By Application of the Court's Decision

A court faced with the problem of statutory interpretation must examine not only the statutory language but also its aim since "[a]rguments of policy are relevant, when, for example, a statute has an hiatus that must be filled or there are ambiguities in the legislative language that must be resolved."*** The Court should attempt "to discern and articulate the provision's purpose."**** The distillation of a statute's basic purpose is necessary in any application of existing law to new conditions not dealt with in express terms.

It has been stated that "[t]he broad goal of U.S. securities laws is the promotion of securities markets whose

* Schoenbaum v. Firstbrook, 405 F.2d 200 (2d Cir. 1968), reversed on other grounds, 405 F.2d 215 (2d Cir. 1968) (en banc) cert. denied sub. nom Manley v. Schoenbaum, 305 U.S. 906 (1969).

** Friendly, Reactions of a Lawyer - Newly Become Judge, 71 Yale L. J. 218, 234 (1961).

*** Unexcelled Chemical Corp. v. United States, 345 U.S. 59, 64 (1953) (dictum).

**** Eck v. United Arab Airlines, Inc., 360 F.2d 804, 812 (2d Cir. 1965).

transactions can adversely affect domestic markets. Accordingly, the statute clearly reflects the Congressional will that foreign transactions, unless exempt, be subject to the federal securities laws. In Schoenbaum, the Court adopted this view stating:

> "Indeed, since Congress found it necessary to draft an exemptive provision for certain foreign transactions and gave the Commission power to make rules that would limit the exemption, the presumption must be that the Act was meant to apply to those foreign transactions not specifically exempted." 405 F.2d at 208.

Additionally, in Section 30(a)*, Congress delegated authority to the Securities and Exchange Commission (SEC) to adopt rules to regulate the conduct of U.S. broker-dealers in transactions occurring abroad. It is significant that although the SEC, an agency entrusted with the administration of the securities laws, which has developed an unparalleled expertise in interpeting and enforcing them,** alone, was given the power to limit or define their reach to foreign transactions, Judge Friendly arrogated to himself that Congressional grant of power.

Regretably, Judge Friendly has failed to utilize an elementary tool of statutory interpretation, ignoring the very

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* 15 U.S.C. §78dd(a).

** It is further significant that although Judge Friendly believed his opinion to be unprecedented and unspported by legislative history, he did not seek advice from the SEC. Had he sought the opinion of that agency, the record in this case clearly reflects that he would have been advised that the SEC considered the antifraud provisions of the securities laws applicable to protect foreign nationals, as well as U. S. residents.

integrity and reliability will protect investors and warrant their confidence."* The United States has long been committed to the maintenance of a domestic securities market in which all investors can participate without fear of being defrauded. As foreign investment in American markets increases, the interests of the United States in preserving the integrity of such markets from foreign wrongdoing mounts. Thus, in denying recovery to foreigners, the Court contravenes the statutory purpose, since the publicized exploitation of foreign investors by Americans in a transaction structured here adversely affected American markets. It is virtually undisputed that the shadow of disreputable activity cast by the American defendants fell upon American securities markets.** The resulting loss of foreign business was a direct and foreseeable result of defendant's activities at home and abroad in connection with the IOS offering. That it constituted a result which Congress sought to avoid cannot, plaintiff submits, be fairly disputed and, accordingly, the Court had Congressional authority to administer the necessary remedy.

The decision of Judge Friendly, however, indicates that he lacked an awareness of the "mischief" which securities

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* Comment, 52 Tex. L. Rev. 983, 1013 (1974).

** The Court fails to distinguish between the direct "effects" caused by the participation of American principals in the securities markets in the fraud alleged and the general "effects" upon American markets resulting from the subsequent collapse of IOS.

laws were "meant to remedy" and failed to consider the statutory purposes. The circumstances of this case present one of the very situations Congress sought to prevent by enactment of the Securities Exchange Act of 1934. Section 30(b) of that Act focused upon the single standard of "evasion". That section was intended to prevent evasion of the securities laws by devices to circumvent their application. Thus, the American broker-dealers, accountants and sellers who structured a fraudulent transaction here should not be permitted to escape liability to foreigners on the ground that they deliberately took pains to confine certain legally significant portions of their fraud to foreign shores so as to evade application of the securities laws.

It is one of the "ancient canons of interpretation that the old law, the mischief and the remedy must be considered by the judge and that the statute under consideration must be given an interpretation which will supress the mischief and advance the remedy. "* It is the judge's duty

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* Newton v. Employers Liability Assurance Corp., 107 F. 2d 164, 167 (4th Cir. 1939), cert. denied 309 U.S. 673 (1940) (Parker, Circuit Judge).

"to suppress subtle inventions and evasions for the continuance of the mischief."*

This venerable maxim was endorsed by Dean Landis who observed:

> "A thorough understanding of the process underlying the statute will often give a clue as to the influence that it deserves. 'Mischiefs," as Coke said, are often responsible for legislative action and are the key to its meaning. The consequences of the mischief may only have been appreciated by the legislature in a limited field and patent abuses alone eliminated. But thorough understanding of the statute enables one to pierce through the specific remedial measures to a concern with the causative influences that made action necessary. On the other hand, statutes may represent merely a rectification of the existing pattern of the law without striking at its deeper assumptions. Yet even rectifications, sufficiently abundant, may, like the empiric process of adjudication, spell out an attitude of more moment than the manifestations themselves, and thus bring into being a policy calling for a fuller realization." **

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* Miller v. Lykes Bros. S.S. Co., 467 F. 2d 464, 467 (5th Cir. 1972); Burstein v. United States Lines Co., 134 F. 2d 89, 93 (2d Cir. 1943).

** Statutes and the Sources of Law, 2 Harv. J. Legis. 7, 22 (1965)

It cannot be gainsaid that the Federal Securities Laws are remedial in nature and should be given a liberal interpretation.* The Supreme Court has continually held that Congress enacted the securities laws for the purpose of preventing fraud and intended that they be construed "not technically and restrictively, but flexibly to effectuate [their] remedial purposes.** Rather than effectuate the Congressional purpose, however, the decision of Judge Friendly serves notice that American broker-dealers, accountants,

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* Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972); Tcherepnin v. Knight, 389 U.S. 332, 336 (1967); Safeway Portland Employees' Federa Credit Union v. C. H. Wagner & Co., 501 F.2d 1120 (9th Cir. 1974); Forman v. Community Services, Inc., 500 F.2d 1246, 1252-1256 (2d Cir. 1974) cert. granted and cases consolidated sub nom. United Housing Foundation, Inc. v. Forman and New York v. Forman, _____ U.S. _____, 95 S. Ct. 801 (1975); SEC v. Koscot Interplanetary, Inc., 497 F.2d 473 (5th Cir. 1974); Glen Arden Commodities, Inc. v. Costantino, 493 F.2d 1027 (2d Cir. 1974); SEC v. Glenn Turner Enterprises, Inc., 474 F.2d 476, 480-481 (9th Cir. 1973), cert. denied 414 U.S. 821 (1973).

** Affiliated Ute Citizens v. United States, supra, at 151; Superintendent of Insurance v. Bankers Life & Casualty Co., 404 U.S. 6, 12, (1971); SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

issuers and sellers can defraud foreigners with impugnity if they can manage to accurately "draw the line between essentially preparatory and actual fraudulent devices conducted in the U. S."*

Judge Friendly appears to justify the obvious subversion of Congressional intent on the ground that the legislature would not have wished to extend the precious resources of American courts to foreign investors. Although Congress would undoubtedly have been sympathetic to an overburdened judiciary and law enforcement agencies, it seems illogical to suggest that the intended scope of remedial legislation should be measured entirely by the mathematics of personnel.

B. Judge Friendly Misinterprets Judicial Precedent, Misapplies International Law and Ignores Cited Commentaries

It has been generally accepted that the principles of international law set only the outer limits of the securities laws' transnational reach, permitting a court to find that Congress intended to stop short of these limits. However, if as Judge Friendly contends, there is an absence of evidence as to the actual Congressional intent, the Court is left with no

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* N. Y. L.J., May 7, 1975, page 4.

basis except sheer speculation, for finding that Congress intended to restrict its reach. In such a situation, "[t]he result is that the principles of international law function as more than mere benchmarks."*

The Court herein, however, declined to believe that Congress intended to exercise its full power. Thus, it refused to equate the Congressional intent with the limits of international law and restricted the transnational reach of the securities laws in an opinion which "clarifies neither the source nor the scope of these limitations."** Moreover, in so doing, it misinterpreted and misapplied the basic principles of international law.

1. The Effects Doctrine Was Erroneously Applied

As plaintiff has discussed above, the export by Americans of the fraudulent IOS offering impaired the confidence of many foreign investors in American securities and American markets. As a direct result of the participation of Americans in a fraud of monumental proportions, conceived and initiated in the United States, the integrity of the American markets was impaired and the flow of capital to American business impeded. The worldwide publicity revealing Americans identified with American securities markets as the principal wrongdoers

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* Comment, The Transnational Reach of Rule 10b-5, 121 U. Pa. L. Rev. 1363, 1370. (1973)

** Ibid. at 1382.

in a scheme to defraud foreign investors led to a global loss of confidence in American securities markets which undoubtedly had a far greater impact upon such markets than the minimal "dilution" of the shares of some Americans in a Canadian corporation caused by the totally foreign transaction between foreign entities in Schoenbaum v. Firstbrook.*

Judge Friendly, however, contended that such impact, even if acknowledged, would not bring the transaction within the objective territorial principle holding that domestic effects were not, as in Schoenbaum, the direct result of the wrongful conduct complained of and, in addition, were not intended. In both contentions, the Court is in error.

The intimate involvement of prominent Americans in a large international securities fraud launched from the United States necessarily adversely affects domestic markets, the very interest the securities laws were designed to protect. In discussing the "effects" issue, Judge Friendly again failed to consider the purpose of the securities laws. He distinguishes the result in Steele v. Bulova Watch Co.**from that herein becuase in the former case, there was a direct effect upon Bulova, the owner of a trademark, as a result of the defendant's infringement activities. He states that nothing in the Steele opinion indicates that the Court would

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* Supra.

** 344 U.S. 280 (1952).

have found jurisdiction if all that had been proved was that the unlawful activity gave the American watchmaking industry a bad name in foreign countries. However, Judge Friendly ignores the fact that the Lanham Trademark Act was specifically intended to protect not industries or markets, but specific individuals, i.e. owners of trademarks, whereas the securities laws were aimed in large part at American securities markets as a whole. Accordingly, conduct which gives such markets a bad name in foreign countries, thereby discouraging foreign investment here, is clearly not only within the ambit of international law, but also the Congressional purpose.

Further, the principles of international law do not require that to confer jurisdiction, "effects" must be intended. Judge Hand's limitation on the effects doctrine followed by Judge Friendly, was both superfluous and illegal, unsupported by prior law and disregarded after its articulation. Since the rule had long been established in antitrust cases that persons are presumed to intend the natural consequences of their acts, evidence of "effects" likewise evidenced the required intent. The courts after the United States v. Aluminum Co. of America,* decision, have not refused to assume jurisdiction in cases of lack of intent, even where proven.**

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* 148 F.2d 416 (2d Cir. 1945).

** See, e.g. United States v. National Lead Co., 63 F.Supp. 513, 518, 527 (S.D.N.Y. 1945) aff'd. 332 U.S. 319 (1947); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 927, 958 (D. Mass. 1950); United States v. Timken Roller Bearing Co., 83 F. Supp. 284, 310 (N.D. Ohio 1949), aff'd. 341 U.S. 593 (1951); Thomsen v. Cayser, 243 U.S. 66, 86 (1917).

Further, the language of the Restatement (Second) of Foreign Relations Law of the United States, §18, cited by Judge Friendly and dealing with "effects" does not represent an accurate expression of international law and is unsupported by the "cases, authorities and the practices of states."* Indeed, the limitations contained in Section 18 were not present in the Tentative Draft and no valid justification** has been suggested for their inclusion in the final product. The Tentative Draft provided in pertinent part:

> "§ 8. Jurisdiction to Prescribe Based on Territory: Conduct Relating to Territory.
>
> A state has jurisdiction to prescribe rules attaching legal consequences to conduct, including rules relating to property, status or other interests with respect to conduct occurring:
>
> (a) In its territory;
>
> (b) Partly within partly outside its territory;
>
> (c) Entirely outside its territory, if the conduct has, or is intended to have, effects within its territory which have a reasonably close relationship to the conduct."

The Draft remains an accurate statement of the law.***

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* Metzger, The Restatement of the Foreign Relations Law of the United States: Bases and Conflicts of Jurisdiction, 41 N.Y.U. L. Rev. 7, 16 (1966).

** Prof. Metzger contends that "oil companies with international interests" mounted an attach which resulted in the change. loc. cit.

*** Modern legislation, draft codes, projects and resolutions make "no distinction bewteen an act and an omission to act or between an intended act or unintended result." Research in International Law, Jurisdiction With Respect to Crime, 29 Am. J. Int'l L., Special Supplement 434 (1935).

2. The Court Erred in According Jursidictional Significance to the Distinction between Preparatory and Operative Acts

Judge Friendly held that the securities laws did not apply to foreign nationals resident abroad because the acts of the defendants in the United States were merely "preparatory" in nature and the actual fraud, that is, the dissemination of the false prospectuses, primarily occurred abroad. However, plaintiff submits, under the circumstances of this case, the distinction drawn is without meaning.

Plaintiff alleged in the complaint that prior to their involvement in the fraud, the American defendants "knew the facts" which had caused others to decline participation in the underwriting and with knowledge of the fraudulent nature of the offering, nevertheless, determined to take part in it. Accordingly, everything done by the defendants to further the unlawful enterprise constituted illegal conduct*. The jurisdictional effect of the transaction should "not be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."**

Further, as one commentatator cited by Judge Friendly has accurately noted:

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* Plaintiff also stated in the complaint that the existence of a conspiracy was a common question of fact.

** Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

"The requirement that the actual misrepresentations which form the basis for the 10b-5 claim be made within the United States fails to take account of the nature of transnational securities dealings. These dealings usually touch upon the territory of more than one nation, and whether a particular misrepresentation is made in one country or another is often a matter of chance. The jurisdiction of a state should not turn on such chance occurrences, for the interest of the state is identical whether or not the particular misrepresentation is made within the state. The requirement that conduct within the territory be significant, or an essential link in the transaction, is better-suited to protecting the interests of a state in regulating conduct within its borders." *

C. The Decision of Judge Friendly Constituted a Legislative Act Designed to Deal With the "Class Action Problem"

Judge Friendly has always stressed the legislative aspect of the judicial function, believing that upon his elevation to the bench, he "suddenly [became] a legislator, exercising power over generations yet unborn".** His strong belief that Congress has in many areas "failed to perform its legislative task"*** has undoubtedly impelled him to undertake, himself, the law making function so as to achieve the scheme of society which he entertains. Judge Friendly has subscribed to the theory that judges should be free to

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* Comment, The Transnational Reach of Rule 10b-5, 121 Penn. L. Rev. 1363, 1375 (1973).

** Friendly, Reactions of a Lawyer - Newly Become Judge, supra, p. 219.

*** Friendly, The Gap in Lawmaking - Judges Who Can't and Legislators Who Won't, 63 Colum. L. Rev. 787, 801 (1963).

impose their views of what they think desirable quoting, with approval, the words of Learned Hand:

> "When a judge tries to find out what the government would have intended which it did not say, he puts into its mouth things which he thinks it ought to have said, and that is very close to substituting what he himself thinks right ...."*

Plaintiff recognizes that in some cases, particularly those in which the legislative intent cannot truly be discerned, a judge is left with a choice which permits the exercise of judicial creativity. However, plaintiff submits, in this case there is a glaring contradiction between what Judge Friendly deems desirable and both the Congressional intent impelling the enactment of the securities laws and the Federal Rules of Civil Procedure. In his decision, Judge Friendly arbitrarily chose to hold that Congress did not intend to protect foreign nationals. A choice implies motives and one cannot but sense that there was an ulterior motive, perhaps sub-conscious, which led Judge Friendly, in rendering his decision, to ignore the accepted methodology of statutory interpretation. The result was a decision against class actions per se, rather than an adjudication of jurisdictional issues. Judge Friendly articulated his subjective perception of the "good and true", seizing upon a unique opportunity to undermine class actions which he strongly believes have become "a matter that needs urgent attention". A judge who has refused

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* Hand, The Spirit of Liberty, 108-10 (2d Ed. 1954), cited in Friendly, The Gap in Lawmaking - Judges Who Can't and Legislators Who Won't, supra, at p. 798.

to accept the class action concept, has little sympathy for those with "$50 claims" and who considers the settlement of class actions "blackmail"* has, by a feat of judicial legislation, dealt class actions a stunning blow.**

Judge Friendly's bias can be seen from the fact that he rendered his class action opinion without receiving the views of the appellee on the issue, a course which the appellee deems highly prejudicial. Although the court had previously refused to consolidate the class action aspect of the appeal, or to permit the appellant to submit an oversize brief so as to present class action issues, Judge Friendly seemed surprised that the appellee had failed to comprehend that when the court twice said "no", it really meant "yes".***

It is clear that Judge Friendly based his decision not on the over-all dimensions of the security transaction in question, but solely upon the class action issues allegely created by foreign members of the class, thus, distinguishing the case from Schoenbaum and Leasco,**** which did not raise "serious problems" of a class action nature. Judge Friendly

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* See Eisen v. Carlisle & Jacquelin, 479 F.2d 1005, 1020 n. 28 (2d Cir. 1974), citing Federal Jurisdiction: A General View. 120 (1973)

** Not only does the elimination of foreign class members emasculate the class, but the making permanent of the state renders settlement of a class action in which jurisdiction is challenged by a non-settling defendant impossible at any stage short of an adjudication by the United States Supreme Court. Appellee contends that, at the least, the stay should be lifted.

*** Appellee completed a brief on the class action appeal which was rendered moot by the decision on this appeal.

**** Leasco Data Processing Equipment Corp.v. Maxwell, 468 F.2d 1326 (2d Cir. 1972).

indicates that a different jurisdictional result might have obtained if the suit had been "by the SEC or by named foreign plaintiffs." Accordingly, Judge Friendly in effect, by legislative fiat, determined in this case that foreign nationals residing abroad are, by virtue of their foreign residence, disqualified as members of a class and, accordingly, the court lacks jurisdiction over their claims if presented by means of the class action device. Not only does such a position find no support in either statutory law or the federal rules, but the decision based thereon is an illogical if not irrational one. "The issue of the power of the Court to bind foreign members of a class living abroad is difficult, unsettling, and may, in and of itself, lead to the conclusion that foreigners living abroad should not be members of the class, but that issue is unrelated to the question of the intent of Congress relating to the off-shore reach of the securities laws."*

Judge Friendly has failed to follow the advice of Judge Learned Hand with respect to statutory interpretation rendered many years after his words quoted above.

> "[b]efore and beyond all the [judge] must purge his mind and will of those personal presuppositions and prejudices which almost inevitably invade all human judgments; he must approach his problems with as little preconception of what should be the outcome as it is given to men to have; in short, the prime condition of his success will be his capacity for detachment."**

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* N. Y. L.J., May 7, 1975, p. 4

** The Spirit of Liberty, supra, p. 165.

That sentiment was also expressed by one commentator who observed "that strong judges prefer to override the intent of the legislature in order to make law according to their own views", perpetrating grave sins "in the name of the intent of the legislature." To condone "the practice of talking in terms of the intent of the legislature, as if the legislature had attributed a broad meaning to certain words, when it is apparent that the intent is that of the judge, is to condone atavistic practices too reminiscent of the medicine man."*

However, "strong judges are always with us; no science of interpretation can ever hope to curb their propensities, but the effort should be to restrain their tendencies not to give them free rein in the name of scientific jurisprudence."** Nevertheless, at the least, creative judges should "hold to a 20th century economic and social philosophy and not to a long outgrown philosophy."*** It is obvious that Judge Friendly would turn the clock back to the days before class

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* Landis, A Note on Statutory Interpretation, 43 Harv. L. Rev. 886, 890, 891 (1930).

** Id. p. 891.

*** Hicks, Organization and Ethics of the Bench and Bar, 171 (1932) quoting Theodore Roosevelt.

actions,* thus placing large scale injuries beyond the pale of legal redress. However, "[t]he need for group remedies is not new and has grown more acute as commercial and social transactions have increased in complexity and dispersion."** Thus, "[w]hat life needs, the law must reckon with."*** Class action litigation has become a valuable part of the American judicial process and it should not, plaintiff submits, be vitiated in the name of Congressional intent.

CONCLUSION

In banc consideration of the instant appeal is most appropriate. The issues decided are of great importance and will become increasingly so as the securities markets of the world become more interrelated. The decision admittedly represents not the view of Congress, but the opinion of a judge who is no longer an active member of this court. Because of personal prejudices, he reached out to decide a class action issue not before the court, but failed to determine the jurisdictional questions presented.

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* A long way since, as early as 1820, Justice Story approved the representative action. West v. Randell, 29 Fed. Case. 718, 729-22 (No. 17,424) (C.C.D. R.I. 1820).

** Note, Federal Class Actions: A Suggested Revision of Rule 23, 46 Colum. L. Rev. 818 (1946).

*** Brown, Electronic Brains and the Legal Mind: Computing the Data Computer's Collision with Law, 71 Yale L. J. 239, 254 (1961).

Since New York City is the financial capital of the world, this Court, more than any other, is called upon to decide questions dealing with international finance. Thus, it is important that a decision interpreting the scope of the securities laws represent the view of this Circuit.

Dated: New York, New York
May 9, 1975

Respectfully submitted,

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OF COUNSEL:

Joan T. Harnes
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60th RD MASPETH, N.Y.

That on the 12 day of MAY, 1975, deponent personally served the within PETITION FOR REHEARING AND SUGGESTION THAT REHEARING BE IN BANC upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

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Robert La Grassa

Sworn to before me this

12 day of May, 1975

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977